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In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM K. REILLY, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

ROBERTA DELANEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Clean Air Act authorizes a court of appeals, in a proceeding reviewing agency action, to order the Administrator of the Environmental Protection Agency to prepare a "federal implementation plan" within a specified time period.

PARTIES TO THE PROCEEDINGS BELOW

The petitioners before the court of appeals were Roberta Delaney, Gayle Hartmann, David Horley, Alama Williams, Maureen Mageau-Decindis and Brian McCarthy. The respondents before the court of appeals were William K. Reilly, Administrator of the Environmental Protection Agency (EPA), and EPA. The State of Arizona intervened in the court of appeals in support of the Administrator and EPA.

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No.

WILLIAM K. REILLY, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

ROBERTA DELANEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of William K. Reilly, Administrator of the Environmental Protecton Agency (EPA), et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 898 F.2d 687.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 18a) was entered on March 1, 1990. A petition for rehearing was denied on May 16, 1990 (App., *infra*, 17a). On August 9, 1990, Justice O'Connor extended the time for filing a

petition for a writ of certiorari to and including September 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are set out in the appendix to this petition. See App., *infra*, 19a-22a.

STATEMENT

The Clean Air Act, 42 U.S.C. 7401 *et seq.*, provides two basic avenues to obtain judicial relief relating to EPA's implementation of the Act. Section 307(b)(1) authorizes the courts of appeals to review—and if necessary reverse—various actions of the Administrator. 42 U.S.C. 7607(b)(1). Section 304(a)(2), by contrast, authorizes the district courts to compel agency action where "there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. 7604(a)(2). In this case, respondents commenced an action against the Administrator under Section 307 of the Clean Air Act challenging his approval of the State of Arizona's revisions to its state implementation plan. The court of appeals held that the Administrator's action was, in certain respects, arbitrary and capricious, and it reversed the Administrator's approval. The court of appeals also went one step further and ordered the Administrator to promulgate a "federal implementation plan"—to replace the disapproved state plan—within six months. The question presented is whether the court of appeals has authority to impose that requirement, which seriously impairs the Administrator's ability to carry out his responsibilities under the Act.

1. The Clean Air Act creates a comprehensive national program for combatting pollution. The basic structure of the present Act was established by the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, and is set out in Sections 109 and 110 of the present Act. Congress charged the Administrator of EPA with developing "national * * * ambient air quality standards" (NAAQS). § 109(a), 42 U.S.C. 7409(a). Congress then required each State to develop and submit to EPA, within nine months after promulgation of the NAAQS, a state implementation plan (SIP) to achieve and maintain the NAAQS within the State. § 110(a)(1)(A), 42 U.S.C. 7410(a)(1)(A). The Administrator was required to determine whether each SIP met certain statutory requirements, including the attainment of applicable "primary" NAAQS, as "expeditiously as practicable" but generally not later than three years from the date of approval of the SIP. § 110(a)(2), 42 U.S.C. 7410(a)(2). If a State failed to submit a SIP, or if the Administrator determined that the SIP failed to meet the Clean Air Act's requirements, the Administrator was empowered to promulgate his own plan (a federal implementation plan or FIP) for the State. § 110(c)(1), 42 U.S.C. 7410(c)(1). See generally *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2530 (1990).

In 1977, Congress amended the Clean Air Act to respond, in large part, to the States' widespread failure to meet the attainment dates of the 1970 Amendments. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. The 1977 Amendments retained much of the structure of the 1970 Amendments, but they also created the concept of a "nonattainment area"—an area where air quality falls short of NAAQS. § 171, 42 U.S.C. 7501. The 1977 Amendments required each State containing a nonattainment area to prepare and secure EPA approval of a new

SIP by July 1, 1979. §§ 110(a)(2)(I), 172(b), 42 U.S.C. 7410(a)(2)(I), 7502(b). Congress extended the deadline for attainment of the primary NAAQS in a nonattainment area to December 31, 1982. § 172(a)(1), 42 U.S.C. 7502(a)(1). Further extensions were permitted for "photochemical oxidants" (ozone) and carbon monoxide, but only if the State demonstrated that attainment was not possible by 1982, despite the implementaion of all reasonably available measures, and that attainment would be achieved "as expeditiously as practicable but not later than December 31, 1987." § 172(a)(2), 42 U.S.C. 7502(a)(2). The 1977 Amendments retained the provisions requiring the Administrator to promulgate a FIP if the State failed to submit an adequate SIP. See § 110(c)(1), 42 U.S.C. 7410(c)(1). See generally *General Motors*, 110 S. Ct. at 2530.

As we have noted, the Clean Air Act provides aggrieved persons with two forms of judicial relief. First, Section 307(b)(1) authorizes a court of appeals to review, and if necessary reverse, various actions of the Administrator, including "the Administrator's action in approving or promulgating any implementation plan" for achieving the Act's ambient air quality standards. 42 U.S.C. 7607(b)(1). See also 42 U.S.C. 7607(d). Section 307(e) states that "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section." 42 U.S.C. 7607(e). Second, Section 304(a)(2) provides that a person may commence a civil action in a district court against the Administrator of EPA where "there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. 7604(a)(2). The district court has jurisdiction "to order the Ad-

ministrator to perform such act or duty, as the case may be." 42 U.S.C. 7604(a).

2. This case arises from a challenge by respondents—a group of Arizona citizens—to the Administrator's approval of Arizona's state implementation plan for portions of Maricopa and Pima Counties. In 1978, EPA designated parts of those counties (which embrace, respectively, Phoenix and Tucson) as nonattainment areas for carbon monoxide. In 1979, Arizona submitted SIP revisions for both areas and applied for an extension of the 1982 attainment deadline to 1987. In 1982, the Administrator gave conditional approval to Arizona's SIP revisions. Three years later, respondents filed an action against the Administrator in district court, under Section 304(a)(2) of the Clean Air Act, to obtain an order declaring the Arizona SIP revisions inadequate and requiring EPA to perform its "non-discretionary" duty to prepare a FIP for Maricopa and Pima Counties (*McCarthy* v. *Thomas*, No. 85-CV-344 (D. Ariz.) (complaint filed Apr. 8, 1985)). See App., *infra*, 3a.[1]

Upon the agreement of the parties, the district court entered an order staying the suit until January 1, 1987. See *McCarthy* v. *Thomas, supra* (order filed Feb. 19, 1986). In late 1986, the Administrator denied Arizona's application for a deadline extension, revoked its 1982 conditional approval, and ultimately did not approve Arizona's subsequent SIP revisions. See App., *infra*, 3a.[2] The district court subsequently ordered the Administrator to prepare a FIP no later than six months after September 30, 1987, unless, before that date, Arizona submitted and the Ad-

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[1] The court of appeals incorrectly suggested that respondents filed their district court action at a later date. See App., *infra*, 3a.

[2] See *Arizona* v. *Thomas*, 829 F.2d 834 (9th Cir. 1987); see also *Arizona* v. *Thomas*, 824 F.2d 745 (9th Cir. 1987).

ministrator approved adequate SIP revisions. *McCarthy* v. *Thomas, supra* (order filed Aug. 11, 1987). The court later extended that deadline to August 10, 1988. *McCarthy* v. *Thomas, supra* (order filed Apr. 19, 1988). Arizona submitted SIP revisions and the Administrator ultimately approved them on August 10, 1988. See App., *infra*, 3a.

Respondents then brought the present action in the court of appeals, under Section 307(b)(1) of the Clean Air Act, challenging the Administrator's approval of Arizona's SIP revisions. The court of appeals granted the petition for review and vacated the Administrator's approval. The court first overturned the Administrator's determination that the nonattainment areas are entitled to take three years, from the date of SIP approval, to come into compliance. The court held that, where a state has failed to meet Congress's 1982 attainment deadline, the SIP must provide for attainment "as soon as possible." App., *infra*, 4a-8a. The court next rejected, as "arbitrary and capricious," the Administrator's failure to require adoption of a number of air pollution control measures that, in the court's view, EPA guidance documents presume are "reasonably available." The court stated that under EPA's guidelines Arizona must bear the burden of demonstrating that the measures would not accelerate the projected attainment date. *Id.* at 8a-11a. The court also rejected, as arbitrary and capricious, the Administrator's determination that the Maricopa County SIP revisions contain adequate "contingency" and "conformity" provisions. *Id.* at 11a-13a. The court denied relief on respondents' other challenges to the SIP revisions. *Id.* at 13a-16a. In the concluding paragraph of its opinion, the court stated:

> We vacate the EPA's approvals of Maricopa and Pima counties' Clean Air Act implementation plans.

> We direct the EPA to disapprove these plans and to promulgate federal implementation plans consistent with this opinion within six months.

Id. at 16a.

The government filed a petition for rehearing and a suggestion of rehearing en banc limited to the question of the court of appeals' relief.[3] The government urged that the court of appeals lacked authority to order EPA to promulgate a FIP and that the six-month deadline for FIP promulgation was inconsistent with the statute and unreasonable. On May 16, 1990, the court of appeals denied the petition without opinion. App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

As this Court recently explained, the Clean Air Act provides specific, carefully crafted remedies for agency inaction, and the courts do not have license to supplant the statutory remedies with judicially created ones. See *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2533-2534 (1990). That reasoning applies with equal force in this case. Section 307 of the Clean Air Act authorizes the court of appeals to review and, if necessary, reverse the Administrator's approval of Arizona's SIP revisions. The court had no authority, however, to take the further step of ordering the Administrator to promulgate a FIP within a specified time period. This Court's decision in *General Motors* specifically identified Section 304 of the Clean Air Act, which authorizes the district courts to compel agency action, as the appropriate source of judicial relief in the event that the Administrator fails to perform a non-discretionary duty. The court of appeals did not have the benefit

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[3] Similarly, in this Court, we do not seek review of the court of appeals' determinations as to the adequacy of Arizona's SIP revisions.

of this Court's *General Motors* decision at the time it entered its decision. We therefore suggest that this Court grant our petition, vacate the court of appeals' judgment insofar as it orders the Administrator to prepare a FIP within a specified time period, and remand the case for further consideration in light of that decision. In the alternative, we urge this Court to reverse summarily the court of appeals' judgment insofar as it orders inappropriate relief.

1. In *General Motors*, the petitioners argued that EPA's failure to approve a State's SIP revisions in a timely manner barred EPA from enforcing the provisions of an existing SIP. This Court rejected that contention, holding that Congress did not intend to bar EPA enforcement suits in those circumstances and that the courts have no authority to impose such a bar. 110 S. Ct. at 2533-2534. The Court explained that the Clean Air Act provides "statutory remedies * * * when EPA delays action on a SIP revision" and that courts accordingly should not create other remedies in their stead. *Id.* at 2534. The Court specifically stated that "the statutory remedies for EPA inaction include a suit to compel agency action under § 304(a)(2)." *Id.* at 2534 n.4. As we have explained, Section 304 authorizes a district court to order the Administrator to perform non-discretionary duties. See 42 U.S.C. 7604.

The Court's decision in *General Motors* arose in the context of an EPA enforcement suit, brought under Section 113(b) of the Act (42 U.S.C. 7413(b)), against a pollution source. The Court's reasoning, however, is equally applicable in this case. Here, respondents brought a Section 307 suit seeking judicial review of the Administrator's approval of Arizona's SIP revisions. Section 307 authorizes a court of appeals to review, and, if necessary, reverse, the Administrator's approval. Once the court of

appeals reversed the Administrator's action, however, that court's reviewing function was at an end. The court had no authority to require EPA to promulgate a FIP within a specified time period. Section 110(c) sets forth the Administrator's obligations in the event a State's proposed SIP revisions are rejected. See 42 U.S.C. 7410(c). If the Administrator fails to fulfill his statutory obligations, respondents have a remedy. As *General Motors* indicates, they may bring a Section 304 suit to compel the Administrator to perform a non-discretionary duty.

Indeed, the principle recognized in *General Motors* applies with even greater force in this case. As an initial matter, the court of appeals was not entitled to presume that the Administrator would fail to promulgate a FIP in a timely manner. See *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965) (administrative agencies are entitled to the presumption "that they will act properly and according to law"). See also, *e.g.*, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971). Additionally, Congress has not given the courts of appeals jurisdiction to provide a remedy for the Administrator's failure to perform a non-discretionary duty; to the contrary, Congress's remedy, set forth in Section 304, lies strictly in the district courts. Moreover, the Clean Air Act's carefully crafted provisions for judicial oversight are themselves drawn from settled principles of administrative law.

This Court has consistently recognized that once a reviewing court finds an agency's action invalid and sets it aside, the court's reviewing function is at an end and the matter returns to the agency for further appropriate agency action. The Court stated the "guiding principle" nearly 40 years ago:

> [T]he function of the reviewing court ends when an

> error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.

FPC v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).[4] The Clean Air Act's judicial review provisions employ this principle. Secion 307 empowers the reviewing court—in this case the court of appeals—to review and, if necessary, reverse agency action, but it does not give the court power to direct the agency's subsequent activities on remand. As the Court has recognized, an agency's task on remand remains "infused with judgment and discretion, requiring the ' "accommodation of conflicting policies that were committed to the agency's care." ' " *Department of the Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990). "It is not a task [courts] ought to undertake on the agency's behalf in reviewing its orders." *Id.* at 1630. See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 144 (1940).

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[4] See *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 55 (1948); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 140-146 (1940). This Court has repeatedly followed that principle. For example, the Court concluded in *FPC* v. *Transcontinental Gas Pipe Line Co.*, 423 U.S. 326 (1976), that a lower court, by ordering an agency to complete an investigation within 30 days, had "overstepped the bounds of its reviewing authority." *Id.* at 329-330, 331. The Court explained that

> a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency.

Id. at 333. See also, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525 (1978). Similarly, when this Court recently held that the Federal Labor Relations Authority erred in its application of certain provisions of the Civil Service Reform Act, the Court refused to adopt a "permissible" alternative interpretation because the agency had not considered the interpretation "in the first instance." *Department of the Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990).

The court of appeals' requirement that the Administrator develop a federal implementation plan within six months, like the enforcement bar in *General Motors*, was apparently intended to motivate prompt agency action.[5] The Clean Air Act contains other provisions, however, to ensure that the Administrator acts with appropriate dispatch. As the Court noted in *General Motors*, Section 304 authorizes interested citizens to bring suit against the Administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. 7604(a)(2). See 110 S. Ct. at 2534 & n.4. Significantly, however, such suits must be brought in a district court, which—unlike a court of appeals—has the factfinding capabilities necessary to investigate the reasons for the agency's inaction, to determine an appropriate remedy and its timing, and to modify the remedy to the extent that changed circumstances dictate. Congress was careful to give the courts of appeals power over those matters that require judicial review of completed agency action, while conferring authority on the district courts as to those matters requiring the exercise of factfinding and enforcement powers. The court of appeals' decision in this case, which would require that court to assume the factfinding role of a district judge, upsets Congress's carefully drawn distinction.[6]

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[5] The court's concern in understandable. Arizona repeatedly has failed to meet the Clean Air Act's deadlines for attainment of the NAAQS. But Arizona is not alone. Indeed, the problem of continuing nonattainment, now as in 1977, is an important legislative topic. Congress is presently considering revisions to the Clean Air Act that will address that matter. See S. 1630, 101st Cong., 2d Sess. (1990) (The Clean Air Act Amendments of 1990).

[6] The courts of appeals have repeatedly recognized the Clean Air Act's bifurcated system for judicial oversight of the agency's imple-

2. Although the legal objection that we present in this petition is narrow, it raises a matter of great practical importance. The court of appeals' requirement that the Administrator promulgate a FIP within a specified time period places severe limitations on the Administrator's ability to exercise "judgment and discretion" (*FLRA*, 110 S. Ct. at 1629) in formulating a legally adequate FIP. The court of appeals' six-month deadline is not required by statute and was formulated without regard to (or even significant inquiry into) what the development of a FIP entails. The Administrator is moving resolutely to meet the court of appeals' six-month deadline. That deadline, however, has required a redirection of EPA's limited resources during a period of serious budgetary constraints and has hampered the Administrator's ability to exercise considered judgment in a sensitive matter of joint federal-state concern.[7]

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mentation of the Act. See *Maine* v. *Thomas*, 874 F.2d 883, 884 (1st Cir. 1989); *Environmental Defense Fund* v. *Thomas*, 870 F.2d 892, 896 (2d Cir. 1989); *Sierra Club* v. *Thomas*, 828 F.2d 783, 787 (D.C. Cir. 1987); *Indiana & Michigan Elec. Co.* v. *EPA*, 733 F.2d 489, 490-491 (7th Cir. 1984). The Ninth Circuit has itself noted that the Act assigns separate roles to the courts of appeals and the district courts. See *Farmers Union Central Exchange, Inc.* v. *Thomas*, 881 F.2d 757, 760 (1989); *Abramowitz* v. *EPA*, 832 F.2d 1071, 1075 (1987). See also *Kamp* v. *Hernandez*, 752 F.2d 1444, 1454 (1985); *Kennecott Copper Corp.* v. *Costle*, 572 F.2d 1349, 1353 (1978).

[7] The court of appeals' mandate issued on May 25, 1990, and the Administrator accordingly is under an obligation to complete the promulgation of the FIP by November 26, 1990. The agency has conducted new air quality modeling for the affected regions, which entails the use of data on emissions and pollutant concentrations to predict mathematically the effects of future pollution controls. The Administrator intends to analyze the modeling results, determine appropriate control measures and publish a notice of proposed rulemaking on September 20, 1990. A public hearing will be held in October, and the

The court of appeals' order not only curtails the Administrator's exercise of discretion, it eliminates or hampers the ability of other interested parties to exercise their statutory rights. For example, Section 110(c)(1) of the Clean Air Act provides that a State may avoid the Administrator's imposition of a FIP if, prior to its promulgation, "such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section." § 110(c)(1), 42 U.S.C. 7410(c)(1). The court of appeals' order in this case, however, prevents Arizona from exercising that important right and limits the State to "submit[ting] proposals to the EPA for its consideration in developing the plans." App., *infra*, 16a n.1. In addition, EPA expects that Arizona citizens, who will be directly affected by the FIP's pollution control measures, will wish to participate through the public commenting process in the preparation of the FIP. The court of appeals' deadline, however, will impose serious time constraints on the Administrator's ability to analyze public comments in formulating the final rule. See note 6, *supra*. Indeed, it is not uncommon, and sometimes necessary, for an agency to issue a revised proposed rule in response to public comments. See, *e.g.*, *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1181 (6th Cir. 1985). See also *Small Refiner Lead Phase-Down Task Force* v.

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public comment period will close in early November. If the government fails to secure relief from the court of appeals' order, the Administrator will have a mere three weeks to analyze the public comments, make appropriate revisions, and sign a final rule. See *Rodway* v. *Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975) (noting an agency's obligations to "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule").

EPA, 705 F.2d 506, 546-547 (D.C. Cir. 1983). The court of appeals' timetable intrusively forecloses that option.

As this Court observed, there is a special need to adhere to Congress's dictates where "important public rights are at stake." *General Motors*, 110 S. Ct. at 2534. In this case, the Clean Air Act specifies an important but limited role for the court of appeals, namely, to review agency action. The court of appeals ignored the Act's limitations and dictated the Administrator's actions on remand. This Court's recent decision in *General Motors* indicates that the court of appeals acted improperly. We submit, however, that the court of appeals should be given an opportunity to reconsider its decision before this Court conducts plenary review. The court of appeals' decision was issued prior to this Court's guidance in *General Motors*, and the court's opinion provided no reasoning or justification for its decision or for its departure from other established precedent. We suggest, accordingly, that this aspect of the court of appeals' judgment should be vacated and the case remanded to the court of appeals for reconsideration in light of *General Motors*.

In the alternative, it would be appropriate for this Court to reverse summarily the court of appeals' judgment insofar as it dictates the Administrator's actions on remand. The court's presumption that the Administrator would not act properly and according to law, and the court's exercise of control over the Administrator's activities on remand (including their scheduling), are flatly inconsistent with well settled principles of administrative law. Moreover, the court of appeals' actions will seriously hamper the Administrator's ability to promulgate a FIP that satisfies the requirements of the Clean Air Act while providing the State of Arizona, its citizens, and other affected persons with an appropriate opportunity for public participation.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated insofar as it orders the Administrator to promulgate a FIP within a specified time period, and the case remanded for further consideration in light of this Court's decision in *General Motors Corp.* v. *United States*, 110 S. Ct. 2528 (1990). In the alternative, the Court may wish to consider summary reversal of the court of appeals' judgment insofar as it orders inappropriate relief.

Respectfully submitted.

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SEPTEMBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-7368

ROBERTA DELANEY; GAYLE HARTMANN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

Petition for Review of Action by the Environmental Protection Agency

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Argued and Submitted
June 26, 1989—San Francisco, California

Filed March 1, 1990
Amended April 11, 1990

AMENDED OPINION

Before: THOMAS TANG, STEPHEN REINHARDT and CHARLES WIGGINS, *Circuit Judges.*

OPINION

WIGGINS, Circuit Judge:

Residents of Maricopa and Pima counties, Arizona, petition this court to vacate as arbitrary and capricious the Environmental Protection Agency's approvals of the counties' Clean Air Act implementation plans. We have jurisdiction under 42 U.S.C. § 7606(b)(1) (1982). We vacate the EPA's approvals of the plans, and direct the EPA to take further action consistent with this opinion.

BACKGROUND

The Clean Air Act, as amended in 1970, mandated that states as expeditiously as practicable, but not later than December 31, 1975, reduce the levels of certain ambient pollutants to comply with the National Ambient Air Quality Standards set by the EPA. 42 U.S.C. § 7409(a), (b) (1982). Preliminarily, each state had to develop a state implementation plan to achieve this goal. 42 U.S.C. § 7410(a) (1982).

After many areas of the country failed to attain some or all of the national ambient air quality standards on time, Congress amended the Act in 1977, providing new deadlines for nonattainment areas. 42 U.S.C. §§ 7501-7508 (1982). The 1977 amendments required states to submit by January 1, 1979, for each of their nonattainment areas, a revised implementation plan that provided for implementation of all reasonably available control measures to attain the relevant national ambient air quality standards as expeditiously as practicable, but not later than December 31, 1982. 42 U.S.C. § 7502. If a state did not submit an adequate revised state implementation plan by the 1979 deadline, the EPA had to promulgate its own federal implementation plan. 42 U.S.C. §§ 7410(c)(1), 7502(b)(1). The 1977 amendments provided only one exception: If a

state demonstrated in its revised implementation plan that the carbon monoxide or ozone ambient air quality standard could not be attained by the close of 1982 despite implementation of all reasonably available control measures, the state could have until the end of 1987 to attain the relevant air quality standard in that nonattainment area. 42 U.S.C. § 7502(a)(2). In that case, the state had to submit a second revised implementation plan to the EPA by July 1, 1982. 42 U.S.C. § 7502(c).

In 1978, the EPA designated large areas of both Maricopa and Pima counties as nonattainment areas for carbon monoxide. In 1979, Arizona submitted revised implementation plans for both areas. In 1983, the EPA approved the plans subject to certain conditions. Neither area, however, satisfied the EPA's conditions or attained the carbon monoxide standard by the 1982 deadline. Arizona failed in its attempt to extend both areas' attainment deadlines to 1987, but submitted additional revised plans for the areas to attain by the 1987 deadline anyway. The EPA rejected these additional revised plans and we upheld that decision. *Arizona v. Thomas*, 824 F.2d 745 (9th Cir. 1987), *later proceeding* 829 F.2d 834 (9th Cir. 1987).

When Arizona thereafter failed to submit adequate plans for Maricopa and Pima counties, petitioners filed suit in the Arizona district court. That court ordered the EPA to promulgate implementation plans for both counties by March 30, 1988 (later extended to August 10, 1988), unless before this date Arizona submitted, and the EPA approved, adequate state plans. *McCarthy v. Thomas*, No. 85-344 (D. Ariz. August 10, 1987). Arizona submitted, and the EPA ultimately approved (with revisions), state implementation plans for both counties on August 10, 1988. Petitioners now challenge these approvals.

DISCUSSION

We will not set aside the EPA's approval of a state implementation plan unless it is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *Arizona v. Thomas*, 824 F.2d at 748. We will not set aside an agency's construction of a statute it is implementing unless that construction conflicts with clear congressional intent or is unreasonable. *Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-45 (1984).

I. THE EPA'S DECISION THAT DELINQUENT NONATTAINMENT AREAS MAY TAKE THREE YEARS FROM APPROVAL OF THEIR STATE IMPLEMENTATION PLAN TO ATTAIN THE NATIONAL AMBIENT AIR QUALITY STANDARDS

Because the Clean Air Act amendments of 1977 made the 1982 compliance deadline absolute (with the one exception noted above), the amendments did not specify an additional deadline for nonattainment areas that failed to obtain revised implementation plan approval and national ambient air quality standard compliance by the 1982 deadline. In this circumstance, the EPA adopted the policy that it should evaluate the adequacy of the Maricopa and Pima county plans based on whether they provide for attainment by three years from the date it approved those plans, August 10, 1991. Petitioners contend that the EPA's policy is arbitrary and capricious. Now that the 1977 amendments' deadline for compliance has passed, petitioner assert, Pima and Maricopa Counties must attain the carbon monoxide ambient air quality standard as soon as possible utilizing every available control measure.

The EPA contends that Congress expressed no clear intent on the attainment deadline that the EPA should apply

in evaluating the Maricopa and Pima county plans because the 1977 amendments did not specify a deadline for nonattainment areas that failed to obtain revised state implementation plan approval and national ambient air quality standard compliance by the 1982 deadline. The EPA argues that this amounts to a "statutory gap." As a result, the EPA believes, we must uphold its policy of allowing compliance within three years of state implementation plan approval because it is a reasonable construction of the 1977 amendments.

The EPA argues that if Congress had considered that some nonattainment areas would not meet the deadline specified in the 1977 Amendments, Congress would have intended that the EPA administratively establish a new three year attainment period from the date of implementation plan approval deadline, like those provided in the Clean Air Act amendments of 1970. The EPA contends that this result is consistent with the language, history, and overall purposes of the Act. The EPA contends that Congress knew some states would not attain by the 1982 deadline and did not intend that states implement draconian measures.

The EPA explains the seemingly absolute nature of the 1977 amendments' 1982 deadline by stating that some legislators felt the need to keep fixed deadlines, even as "somewhat of a legal myth," because they "provided a basis for obtaining maximum progress towards clean air." Transcript, Mark-up, Clean Air Act Amendments, at 13 (May 4, 1977) (Statement of Sen. Domenici), *reprinted in* State Implementation Plans for Nonattainment Areas for Ozone and Carbon Monoxide: General Preamble and Notice of Future Actions, 52 Fed. Reg. 26,408 (July 14, 1987) [hereinafter "Preamble and Notice"]. If the deadlines turned out not to be realistic, there would be

"plenty of time for legislative relief." 123 Cong. Rec. 18,038 (June 8, 1977) (Statement of Sen. Stafford), *reprinted in* Preamble and Notice, 52 Fed. Reg. 26,408 (July 14, 1987). The EPA contends that petitioners' position would require the draconian measures that Congress allegedly intended to avoid. The EPA argues that, in effect, it is just doing what Congress did in 1977 when, faced with many states' failure to meet attainment deadlines, Congress revised the Clean Air Act, extending those deadlines at least three years.

Although we recognize the EPA's predicament, we cannot accept the EPA's position. As the EPA itself recognizes, Congress explicitly declined to allow extensions of the deadline because it believed an absolute deadline to be necessary. Other circuits have characterized the 1982 deadline as the " 'heart' of the 1977 Amendments," *City of Seabrook v. EPA*, 659 F.2d 1349, 1357 (5th Cir. 1981), *cert. denied*, 459 U.S. 822 (1982), implemented according to a precise schedule to avoid a repetition of the failure of many states to attain the national ambient air quality standards by the deadline specified in the 1970 amendments. *Connecticut Fund for the Environment v. EPA*, 672 F.2d 998, 1001-02 (2d Cir.), *cert. denied*, 459 U.S. 1035 (1982).

This court has already found the deadlines of the 1977 amendments to be "clear and unambiguous." *Abramowitz v. EPA*, 832 F.2d 1071, 1079 (9th Cir. 1987). We stated:

> Because we find the language of the Act clear and unambiguous, we do not believe that EPA has the discretion to ignore the statutory deadline. We are informed by counsel for both sides of their expectation that Congress will extend the deadline once again in the near future, but we must apply the law as it now stands, not as it may become. . . . Until the Clean Air

> Act is further considered . . . the Agency must "give effect to the unambiguously expressed intent of Congress."

Id. (citations omitted).

We, and the EPA, are bound by the statutory scheme until Congress alters that scheme. As the EPA states in one of its national guidance documents:

> [T]he legislative history shows that Congress set up the Part D system in order to force communities and industry to do their utmost to bring about attainment as rapidly as possible and expected that a future Congress would change the course it had set, if necessary, to avoid any unacceptable consequences.
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> . . .
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> . . . Plainly, the original intention of the committee, which evolved ultimately into the current Part D system, was to generate [state implementation plans] that would provide for attainment by a specific date, even if they contained draconian measures, and to leave the task of making adjustments to a future Congress.

Preamble and Notice, 52 Fed. Reg. 26,407-08 (July 14, 1987).

When Congress has explicitly set an absolute deadline, congressional intent is clear. It is a semantic game to claim that once a state fails to meet an absolute deadline, a statutory gap is created because Congress has not provided a back-up deadline for its explicitly absolute deadline. If Congress had been more lenient and allowed a one-year fall back extension, the EPA would be bound by that directive. The EPA cannot extract leeway from a statute that Congress explicitly intended to be strict.

In any case, the EPA's national guidance documents state that for those areas that qualified for an extension

from 1982 to 1987, if their control measures "are not adequate to demonstrate attainment by 1987, additional measures which can be implemented after 1987 must be identified and adopted and attainment must be demonstrated by the earliest possible date." Environmental Protection Agency Criteria for Approving 1982 Ozone and Carbon Monoxide Plan Revisions, 46 Fed. Reg. 7186 (January 22, 1981) [hereinafter "Criteria"]. "The 1982 [state implementation plan] revision . . . must demonstrate that all possible measures will be implemented. . . ." *Id.* at 7188 (listing four examples of additional control measures). We believe that it is unreasonable for the EPA to treat more leniently areas that did not qualify for the 1987 extension than areas that did qualify. We believe that the only reasonable interpretation of the 1977 amendments is that if the 1982 deadline that Congress specified is not met, the national ambient air quality standards must be attained as soon as possible with every available control measure, including those that the EPA identified in its criteria for approving 1982 plans.

II. THE EPA'S DECISION THAT THE MARICOPA AND PIMA PLANS PROVIDE FOR SUFFICIENT CONTROL MEASURES

The plans that the EPA approved for Maricopa and Pima Counties are similar. Both require that:

(1) gas stations sell only high oxygen content fuel during winter months (when carbon monoxide levels are highest);

(2) large employers reduce the amount of single car commuting by their employees;

(3) automobiles be tested for emission levels while under load as well as while idling.

Petitioners point out that neither the Maricopa plan nor the Pima plan adopts most of the forty-five measures recommended in a study of Maricopa County conducted by the Maricopa Association of Governments, a regional planning organization. Similarly, neither plan adopts most of the twelve measures recommended by Cambridge Systematics, a group that conducted an EPA-sponsored study of Maricopa County. The excluded measures include major expansion of mass transit, imposition of parking controls, significant use of bus and carpool lanes, reductions in bus fares, restrictions on truck travel during peak periods, application of the Maricopa and Pima county oxygenated fuel program and automobile emission testing program to the entire state, elimination of waivers to the automobile emission testing program, and adoption of year-round daylight savings time. The Maricopa Association of Governments noted that immediate implementation of all the measures it identified could have produced attainment within one year.

Petitioners contend that it was arbitrary and capricious for the EPA to approve the plans without more control measures. The EPA contends that it properly approved the Maricopa and Pima plans with just the three control measures that they contain, because additional control measures "could not be demonstrated to further accelerate the projected attainment date."

The EPA has, however, arbitrarily shifted from Arizona the burden of demonstrating that control measures would not accelerate the projected attainment date. An EPA guidance document explicitly provides that each of the eighteen measures listed in 42 U.S.C. § 7408 is presumed reasonably available; a state can reject one of these measures only by showing that the measures either would not advance attainment, would cause substantial wide-

spread and long-term adverse impact, or would take too long to implement. The document states:

> [I]f a state adopts less than all [reasonably available control measures] *and demonstrates* (a) that reasonable further progress and attainment of the [national ambient air quality standards] are assured, and (b) that application of all [reasonably available control measures] would not result in attainment any faster, then a plan with less than all [reasonably available control measures] may be approved.

State Implementation Plans; General [P]reamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas, 44 Fed. Reg. 20,375 (April 4, 1979) (emphasis added).

Neither the Maricopa plan nor the Pima plan contains serious commitment to many of the measures listed in section 7408, including: 1) limiting portions of roads to common carriers; 2) improving transit systems with major changes in existing facilities; 3) controlling on-street parking; 4) establishing auto-free zones; 5) instituting road user fees that discourage single occupant automobile trips; or 6) retrofitting older vehicles with emission control devices. *See* 42 U.S.C. § 7408(f)(1)(A)(v), (vi), (vii), (ix), (xiii), (xvii). Yet Arizona has made no claim that any of the control measures that section 7408 or the Maricopa Association of Governments identified is impracticable or unreasonable in either Maricopa County or Pima County.

Furthermore, as noted above, for a nonattainment area that qualified for deadline extension to 1987, the 1977 amendments require implementation of not only all reasonably available control measures, but also any additional measures necessary to ensure timely attainment. 42 U.S.C. § 7502(b)(11)(C). If such an area failed to attain the relevant ambient air quality standard by 1987, the

EPA required implementation of "all possible measures" and more extensive evidence to justify failure to adopt any of the measures listed in section 7408 in order to ensure "the most expeditious [attainment] date beyond 1987." Criteria, 46 Fed. Reg. 7188 (January 22, 1981). The EPA expressly applied these requirements to nonattainment areas that failed to meet the 1982 statutory deadline and did not qualify for deadline extensions to 1987. Guidance Document for Correction of Part D SIP's For Nonattainment Areas, January 27, 1984, at 32-33 [hereinafter "Part D SIP's for Nonattainment Areas"].

We, therefore, conclude that the EPA arbitrarily and capriciously found that the Maricopa and Pima plans provide for sufficient control measures.

III. THE EPA'S DECISION THAT THE MARICOPA PLAN PROVIDES ADEQUATE CONTINGENCY AND CONFORMITY PROVISION[S]

The EPA's published guidelines require post-1982 carbon monoxide implementation plan revisions to contain a contingency plan to be implemented if shortfalls in emission reductions occur during the period covered by the plan. *See* Criteria, 46 Fed. Reg. 7188 (January 22, 1981) (prescribing the policy for nonattainment extension areas). The contingency plan must provide: (a) a list of planned transportation measures that may adversely affect air quality and that will be delayed while the state implementation plan is being revised, if expected emission reductions or air quality improvements do not occur; and (2) a description of the process that will be used to determine and implement additional transportation measures beneficial to air quality that will compensate for unanticipated shortfalls in emission reductions. *Id.*

The Maricopa plan contains neither of these. Petitioners contend that the EPA arbitrarily and capriciously waived

its contingency plan requirement. The EPA contends that its contingency plan provision applies only to nonattainment extension areas. But as we note above, the EPA expressly applied its nonattainment extension area requirements to nonattainment nonextension areas. *See* Part D SIP's for Nonattainment Areas, at 32-33. Indeed, it would be anomalous for the EPA not to require as stringent measures for delinquent areas as for areas that qualified for extensions.

The EPA alternatively contends that each plan contains two traffic control measures beyond those necessary to demonstrate attainment by December 31, 1991, and that these additional measures are the functional equivalent of a contingency plan. We disagree. First, we held above that the EPA erred in not requiring compliance before December 31, 1991. Second, the EPA concedes that the two traffic control measures in question—a voluntary no-drive day program and a minimum market share for alcohol fuels—are of such speculative value that the EPA could not assign them any emission reduction value. *See* Approval and Promulgation of Implementation Plans; Arizona State Implementation Plan Revision; Maricopa County Carbon Monoxide Plan, 53 Fed. Reg. 30,232 (August 10, 1988) [hereinafter "Approval of Maricopa Plan"]. Programs of such speculative benefit are not the functional equivalent of a list of specific projects that will be delayed and a description of the specific process that will be used to determine and implement additional transportation control measures if they become necessary. We find that the EPA has arbitrarily and capriciously waived its requirement of a contingency plan.

The Clean Air Act explicitly requires that all federal activities conform to Clean Air Act Implementation Plans. 42 U.S.C. § 7506(c). The EPA guidelines direct that to

assure compliance with this mandate, each implementation plan "should identify, to the extent possible, the direct and indirect emissions associated with major federal actions. . . ." Criteria, 46 Fed. Reg. 7188 (January 22, 1981). The state implementation plan must contain "[a]dministrative and technical procedures and agency responsibilities for ensuring . . . that transportation plans, programs and projects" will conform with the state implementation plan. *Id.* The EPA does not dispute that the Maricopa plan fails to meet either requirement. Petitioners argue that the EPA arbitrarily and capriciously waived these requirements. The EPA argues, however, that we should sustain as within its discretion, its finding that the plan sufficiently assures conformity "given the flexibility which should be accorded [the EPA's] practical implementation of the [Clean Air Act]'s statutory provisions."

Again, we cannot agree. The EPA must adhere to its own guidelines. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Service v. Dulles*, 354 U.S. 363, 388 (1957). Because it is undisputed that the Maricopa plan fails to meet either of the EPA's own requirements and the EPA offers no reason for waiving those requirements, we can conclude only that the EPA arbitrarily and capriciously approved the plan. *See Illinois State Chamber of Commerce v. EPA*, 775 F.2d 1141, 1147 (7th Cir. 1985).

IV. THE EPA'S DECISION THAT THE MARICOPA PLAN PROVIDES ADEQUATE MAINTENANCE OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS

The Clean Air Act requires that implementation plans provide for maintenance of national ambient air quality standards after attainment. 42 U.S.C. § 7410(a)(2)(B). Petitioners contend that the Maricopa provisions for

maintenance are inadequate because the plan considers air quality only ten years into the future. The EPA required projections only ten years into the future because it found that projections beyond ten years are unreliable. Of course, this finding would not have justified the EPA's disregard for its rules without a formal revision of the rules in accordance with the Administrative Procedure Act. But even assuming that the EPA's own rule generally requires maintenance projections twenty years into the future applies to delinquent nonattainment nonextension areas (which the EPA disputes), that rule allows plans to provide maintenance projections only ten years into the future. The rule states:

> The time period analyzed shall extend at least 20 years or, if modified under § 51.63, not less than 10 years from the date on which the Administrator identified the area.

40 C.F.R. § 451.42 (1987). Section 51.63(a) adds:

> At the request of a State, or under his own initiative, the Administrator, where he determines it appropriate, may approve alternative [air quality maintenance area] analysis and plan development procedures as allowed under §§ 51.42, 51.44, 51.45, 51.46, 51.48(b), and 51.60(a). He may consider all relevant factors including but not limited to air quality problems, financial and manpower limitations, administrative feasibility, and existing commitments by the State.

40 C.F.R. § 51.63(a) (1987).

The preamble to these regulations specifically states that one of Section 51.63(a)'s "relevant factors" is the reliability of the maintenance projections:

> The time periods will be selected by the Administrator, through his Regional Administrators, consider-

> ing such factors as State resources, other planning programs that may significantly affect air quality, *the reliability of projections*, and the extent of present and potential air quality problems.

Maintenance of National Air Quality Standards—Summary, 41 Fed. Reg. 18,386 (May 3, 1976) (emphasis added).

In this case, the EPA specifically found that projections beyond ten years into the future "become too speculative to be reliable." Approval of Maricopa Plan, 53 Fed. Reg. 30,234 (August 10, 1988). Petitioners' own contention that traffic projections changed dramatically from February 1987 to October 1987 supports the EPA's conclusion that projections are quite speculative. We, therefore, cannot say that the EPA arbitrarily or capriciously required a maintenance projection only ten years into the future.

V. THE EPA'S DECISION NOT TO CONSIDER REVISED, INCREASED VEHICLE TRAFFIC PROJECTIONS IN EVALUATING THE MARICOPA PLAN

The Maricopa plan based its projection that Maricopa County would attain the carbon monoxide ambient air quality standard by 1991 on traffic projections made in 1984 and in February 1987. The EPA refused to consider revised, increased vehicle traffic projections for Maricopa County that petitioners presented during the public comment period for the Maricopa plan. The EPA argues that petitioners submitted this new data only four weeks before the approval deadline and thus the EPA lacked sufficient time to incorporate it into the plan. Petitioners contend that the EPA acted arbitrarily and capriciously in failing to consider the revised, increased vehicle traffic projections. They also contend that the EPA's decision that the Maricopa plan provides adequate maintenance of the na-

tional ambient air quality standards was arbitrary and capricious because it failed to rely on the revised vehicle traffic projections.

We do not determine whether the EPA acted arbitrarily and capriciously in its decision not to consider the revised traffic projections. Our holdings on the other issues in this case require the EPA to develop a new Maricopa county implementation plan. To develop that plan properly the EPA will, of course, need to consider the most recent vehicle traffic projections currently available. Whether, due to time constraints, the EPA in 1988 justifiably refused to consider the revised, increased traffic projections is now an issue of only academic significance.

CONCLUSION

We grant the petition for review. We vacate the EPA's approvals of Maricopa and Pima counties' Clean Air Act implementation plans. We direct the EPA to disapprove these plans and to promulgate federal implementation plans consistent with this opinion within six months.[1] To summarize, the new plans must utilize all available control measures to attain the carbon monoxide ambient air quality standard as soon as possible. The new plans must contain contingency and conformity plans in accordance with EPA guidelines and must be based on the most recent traffic projections currently available. We grant petitioners' motion for fees and costs and direct petitioners to submit appropriate documentation to this court.

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[1] Arizona may, of course, submit proposals to the EPA for its consideration in developing the plans.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7368

ROBERTA DELANEY; GAYLE HARTMANN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

[Filed MAY 16, 1990]

ORDER

Before: TANG, REINHARDT and WIGGINS, *Circuit Judges.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 88-7368

ROBERTA DELANEY; GAYLE HARTMANN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

JUDGMENT

[Filed and entered March 1, 1990]

Upon Petition to Review an order of the Environmental Protection Agency

This Cause came on to be heard on the Transcript of the Record from the Environmental Protection Agency and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition for review of the order of the Environmental Protection Agency in this cause be, and hereby is GRANTED.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 110(c) of The Clean Air Act, 42 U.S.C. 7410(c). .

Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(a) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the re-

quirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 of this title shall not be required to be promulgated before the date eight months after such date required for submission.

Section 304(a) of The Clean Air Act, 42 U.S.C. 7604(a).

Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

Section 307(b) of The Clean Air Act, 42 U.S.C. 7607(b).

Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the

Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

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